Alan Thomas Bohlsen v Draftworldwide Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–6 OF 2002
ABDUL MALIK ISHAK J
6 JUNE 2009

Contract — Damages — Mitigation — Contract of employment — Repudiation by employer — Employee's claim for salary in lieu of notice — Whether employee took necessary steps to mitigate losses — Whether employee secured new employment

Contract — Employment contract — Breach — Whether repudiation of employment agreement due to fundamental breach by employer — Whether employer's breach went to root of contract — Whether repudiation accepted by employee — Whether employee entitled to resign and claim for constructive dismissal — Test for constructive dismissal

Contract — Parol evidence — Interpretation of agreement — Whether historical background admissible in determining importance of a term in contract

Evidence — Parol evidence rule — Construction of document by reference to parties' understanding of it — Whether historical background admissible in determining importance of a term in contract

Labour Law — Employment — Contract of employment — Repudiation of employment agreement due to fundamental breach by employer — Whether employer's breach went to root of contract — Whether repudiation accepted by employee — Whether employee entitled to resign and claim for constructive dismissal — Test for constructive dismissal

Labour Law — Employment — Damages — Mitigation — Repudiation of employment agreement by employer — Employee's claim for salary in lieu of notice — Whether employee took necessary steps to mitigate losses — Whether employee secured new employment

The defendant was incorporated by the plaintiff with three other persons in

December 1991. In February 1992, the defendant employed the plaintiff as the defendant's creative director. In 1997, Draftdirect Worldwide Inc ('Draftdirect') purchased all the shares in the defendant including the plaintiff's shares. The defendant then became a wholly-owned subsidiary of Draftdirect. The plaintiff was given an incentive to remain with the defendant. Draftdirect promised to grant options to the plaintiff to purchase shares ('the options') in Inter Public Group of Companies, the parent company of Draftdirect ('the parent company') subject to certain terms. With this incentive, the plaintiff was enticed into continuing to be employed as a creative director of the defendant notwithstanding the takeover and the change of name. About three years later, a formal contract of employment ('the employment agreement') was signed between the plaintiff and the defendant. Clause 6.01 of the employment agreement provided that the defendant will recommend to the parent company's compensation committee to grant to the plaintiff, as soon as reasonably practicable after the full execution of the employment agreement, options to purchase an aggregate total of 3,000 shares of the parent company ('the recommendation') and also provided for the manner in which the options were exercisable. The terms of the employment agreement were subsequently supplemented by the defendant's letter dated 2 April 2001 (collectively referred to as 'the contract'). The plaintiff, in this suit, claimed damages contending that the defendant had breached the contract in several aspects and that the defendant had repudiated the contract. The defendant denied the repudiatory breaches and contended that the plaintiff had on his own accord terminated the contract prematurely. The defendant counterclaimed for four months' salary in lieu of notice.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) The historical background showed how important the options were to the plaintiff and why the plaintiff felt that a breach of the term went to the root of the employment contract. Section 9 of the Evidence Act 1950 rendered admissible the historical background (see para 3).

(2) Where the employee on his own accord terminates the contract, with or without notice, in circumstances that he is entitled to terminate it without notice by reason of the employer's conduct, this is known as a 'constructive dismissal'. The employee must clearly indicate that he is treating the contract as having been repudiated by the employer and if the employee fails to do so, by word or conduct, he is not entitled to claim that he has been constructively dismissed. The plaintiff had complied with the law before he considered himself as being constructively dismissed by the defendant (see paras 25–26).

(3) Only in those cases where the employer's conduct amounts to a significant breach, going to the root of the contract, would the employee be entitled to resign and claim for constructive dismissal. Only when the employer's wrongful conduct is serious, amounting to a fundamental breach of the contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract, would the employee be entitled to consider himself as constructively dismissed. Only the actual conduct of the employer and not the perception of the employer's conduct by the employee that can support a case of constructive dismissal. The test for constructive dismissal is contractual in nature, namely, whether the employer's conduct amounted to a fundamental breach or repudiation of the contract of employment by the employer (see paras 28, 31 & 33).

(4) The plaintiff succeeded in proving, on the balance of probabilities, that the defendant had breached its obligations of cl 6.01 of the employment agreement as well as in relation to the other issues pertaining to EPF, internet access, access to the computer hardware and software, telephone bills and automobile expenses, and that these breaches went to the root of the contract. Such breaches entitled the plaintiff, at law, to accept the defendant's repudiation and treat the contract as coming to an end. The plaintiff rightly considered himself as constructively dismissed (see paras 84, 107 & 111).

(5) The plaintiff took the necessary steps to mitigate his losses when his contract was terminated. But, unfortunately, he was unable to secure any employment. When his contract was terminated he was 63 years of age and potential employers regarded him as too old. In short, he was jobless and had no income ever since he was terminated (see para 112).

[Bahasa Malaysia summary

Defendan telah ditubuhkan oleh plaintif bersama tiga orang lain pada bulan Disember 1991. Pada bulan Februari 1992, defendan telah melantik plaintif sebagai pengarah kreatif defendan. Dalam tahun 1997, Draftdirect Worldwide Inc ('Draftdirect') telah membeli semua saham dalam defendan termasuklah saham-saham plaintif. Defendan kemudian menjadi anak syarikat milik penuh Draftdirect. Plaintif telah diberikan insentif untuk kekal dengan defendan. Draftdirect telah berjanji untuk memberikan pilihan kepada plaintif untuk membeli saham-saham ('pilihan-pilihan tersebut') dalam Kumpulan Syarikat Inter Public, syarikat induk Draftdirect ('syarikat induk') tertakluk kepada terma-terma tertentu. Dengan insentif ini, plaintif tertarik untuk terus bekerja sebagai pengarah kreatif defendan meskipun berlaku pengambilalihan dan pertukaran nama. Lebih kurang tiga tahun kemudian, satu kontrak pekerjaan rasmi ('perjanjian pekerjaan tersebut')

telah ditandatangani di antara plaintif dan defendan. Fasal 6.01 perjanjian pekerjaan tersebut memperuntukkan bahawa defendan akan direkomenkan kepada jawatankuasa pampasan syarikat induk tersebut untuk memberikan kepada plaintif, dengan secepat mungkin setelah pelaksanaan sepenuhnya perjanjian pekerjaan tersebut, pilihan-pilihan tersebut untuk membeli agregat sejumlah 3,000 saham syarikat induk tersebut ('rekomendasi tersebut') dan juga memperuntukkan cara bagaimana pilihan-pilihan tersebut boleh dilaksanakan. Terma-terma perjanjian pekerjaan tersebut kemudiannya telah ditambah dengan surat defendan bertarikh 2 April 2001 (dirujuk secara kolektif sebagai 'kontrak tersebut'). Plaintif, dalam guaman ini, menuntut ganti rugi dengan menegaskan bahawa defendan telah melanggar kontrak tersebut dalam beberapa aspek dan bahawa defendan telah menamatkan kontrak tersebut. Defendan telah menafikan pelanggaran-pelanggaran yang menyebabkan penamatan dan menghujah bahawa plaintif dengan sendirinya telah menamatkan kontrak tersebut secara pra matang. Defendan telah menuntut balas untuk gaji empat bulan sebagai ganti notis.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

(1) Latar belakang sejarah menunjukkan betapa penting pilihan-pilihan tersebut kepada plaintif dan kenapa plaintif merasakan bahawa pelanggaran terma telah menjejaskan akar umbi perjanjian pekerjaan tersebut. Seksyen 9 Akta Keterangan 1950 menjadikan latar belakang sejarah tersebut boleh diterima (lihat perenggan 3).

(2) Di mana pekerja dengan sendirinya menamatkan kontrak, dengan atau tanpa notis, dalam keadaan yang dia berhak menamatkannya tanpa notis dengan alasan perlakuan majikan, ini dikenali sebagai 'constructive dismissal'. Pekerja itu hendaklah dengan jelas menunjukkan bahawa dia menganggap kontrak tersebut sebagai telahpun ditamatkan oleh majikan dan jika pekerja itu gagal berbuat sedemikian, melalui perkataan atau perlakuan, dia tidak berhak menuntut yang dia telah dipecat secara konstruktif. Plaintif telah mematuhi undang-undang sebelum dia menganggap dirinya telah dipecat secara konstruktif oleh defendan (lihat perenggan 25–26).

(3) Hanya dalam kes-kes di mana perlakuan majikan membentuk pelanggaran ketara, sehingga ke akar umbi kontrak tersebut, maka pekerja itu berhak meletak jawatan dan menuntut pemecatan konstruktif. Hanya apabila perlakuan salah majikan adalah serius, sehingga membentuk pelanggaran penting kontrak tersebut di mana seseorang yang munasabah boleh membuat kesimpulan bahawa majikan itu menampakkan niat untuk tidak terikat dengan kontrak tersebut, maka pekerja itu berhak menganggap dirinya sebagai telah

dipecat secara konstruktif. Hanya dengan perlakuan sebenar majikan dan bukan persepsi perlakuan majikan oleh pekerja itu yang boleh menyokong kes pemecatan konstruktif. Ujian pemecatan konstruktif bersifat kontraktual, iaitu, sama ada perlakuan majikan membentuk pelanggaran atau penamatan penting kontrak pekerjaan oleh pekerja (lihat perenggan 28, 31 & 33).

(4) Plaintif telah berjaya membuktikan, atas imbangan kebarangkalian, bahawa defendan telah melanggar kewajipannya dalam fasal 6.01 perjanjian pekerjaan dan juga berkaitan isu-isu lain berkenaan KWSP, capaian internet, capaian perkakasan dan perisian komputer, bil-bil telefon dan perbelanjaan automobil, dan bahawa pelanggaran-pelanggaran berikut menjejaskan sehingga ke akar umbi kontrak tersebut. Pelanggaran-pelanggaran sedemikian memberi hak kepada plaintif, dari segi undang-undang, untuk menerima penamatan defendan dan menganggap kontrak tersebut sebagai telah tamat. Plaintif dengan sah menganggap dirinya telah dipecat secara konstruktif (lihat perenggan 84, 107 & 111).

(5) Plaintif telah mengambil langkah-langkah yang perlu untuk mengurangkan kerugiannya apabila kontraknya ditamatkan. Namun, malangnya, dia tidak dapat sebarang pekerjaan. Ketika kontrak tersebut ditamatkan dia berumur 63 tahun dan bakal majikan menganggap dia terlalu tua. Pendek kata, dia tiada pekerjaan dan tiada pendapatan sejak dia diberhentikan (lihat perenggan 112).]

Notes

For a case on interpretation of agreement, see 3(1) *Mallal's Digest*, (4th Ed, 2006 Reissue) para 4555.

For cases on breach, see 3(1) *Mallal's Digest*, (4th Ed, 2006 Reissue) paras 3475–3479.

For cases on construction of documents, see 7(2) *Mallal's Digest*, (4th Ed, 2006 Reissue) paras 1900–1901.

For cases on contract of employment, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 862–886.

For cases on damages, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 898–905.

For cases on mitigation, see 3(1) *Mallal's Digest*, (4th Ed, 2006 Reissue) paras 3359–3376.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500, CA (refd)

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)

Aktion Maritime Corporation of Liberia v S Kasmas & Brothers Ltd & Ors (The 'Aktion') [1987] 1 Lloyd's Rep 283 (refd)
Alderslade v Hendon Laundry, Limited [1945] KB 189, CA (refd)
Bank of Credit and Commerce International SA v Ali & Ors [2002] 1 AC 251, HL (refd)
Beare v Garrod (1916) 85 LJKB 717, CA (refd)
Bremer Handelsgesellschaft Schaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109 (refd)
British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited [1912] AC 673, HL (refd)
Bunge Corporation New York v Tradex Export SA Panama [1981] 1 WLR 711 (refd)
Cehave NV v Bremer Handelsgesellschaft mbH The Hansa Nord [1976] QB 44, CA (refd)
Chanter v Hopkins [1835–1842] All ER Rep 346 (refd)
Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (refd)
Chua Kim Suan v Ang Mek Chong [1988] 3 MLJ 231, HC (refd)
Courtaulds Northern Spinning Ltd v Sibson & Transport & General Workers Union [1988] ICR 451; [1988] IRLR 305, CA (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)
Habee Bur Rahman v PP [1971] 2 MLJ 194, HC (refd)
Hay or Bourhill v Young [1943] AC 92, HL (refd)
Hill (RF) Ltd v Mooney [1981] IRLR 258 (refd)
Holland v Glendale Industrial Ltd [1998] ICR 493 (refd)
Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 (refd)
John v Price Waterhouse Coopers (formerly Price Waterhouse) [2002] EWCA Civ 899, CA (refd)
Lai Ah Kam & Anor v Rex [1939] MLJ 306, CA (refd)
Lakshmandas Chaganlal Bhatia and others v The State AIR 1968 Bom 400 (refd)
Lim Seng Chuan v PP [1977] 1 MLJ 171, CA (refd)
Ling Ngan Liong v PP [1964] MLJ 20, FC (refd)
Livingstone v The Rawyards Coal Company (1880) 5 App Cas 25, HL (refd)
Lock v Furze (1865–1866) LR 1 CP 441 (refd)
Logabax Ltd v R H Titherley [1977] ICR 369; [1977] IRLR 97; 12 ITR 158 (refd)
McCutcheon v David MacBrayne Ltd [1964] 1 WLR 125, HL (refd)

Mechanical and General Inventions Co Ltd, and Lehwess v Austin and The Austin Motor Co Ltd [1935] AC 346, HL (refd)
Moo Ng v Kiwi Products Sdn Bhd Johor & Anor [1998] 3 CLJ 475, HC (refd)
Morrells of Oxford Ltd v Oxford United Football Club Ltd & Ors [2001] Ch 459, CA (refd)
Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75, CA (refd)
Ong Lai Kim v PP and other appeals [1991] 3 MLJ 111, HC (refd)
Owners of the Steamship 'Mediana', The v The Owners, Master and Crew of the Lightship 'Comet', The 'Mediana' [1900] AC 113, HL (refd)
P, Re [1989] Crim LR 897, CA (refd)
Parkin v Moon & Anor (1836) 7 CAR & P 408 (refd)
Phibro Energy AG v Nissho Iwai Corporation & Anor [1987] Folio No 1232 (refd)
PP v Chew Yoo Choi [1990] 2 MLJ 444, HC (refd)
PP v Guan Sheng Trading Sdn Bhd [1997] 4 MLJ 20, HC (refd)
PP v Kok Heng & 2 Ors [1948] MLJ 171, HC (refd)
PP v Mustaffa bin Ahmad [1986] 1 MLJ 302, HC (refd)
President of India v Jebsens (UK) Ltd & Ors (The 'General Capinpin', 'Proteus', 'Free Wave' And 'Dinara') [1989] 1 Lloyd's Rep 232, CA (refd)
R v Kalia & Ors [1975] Crim LR 181, CA (refd)
R v Thomas Michael Treacy [1944] 2 All ER 229, CA (refd)
Rex v William Arnold Thomson [1912] 3 KB 19, CA (refd)
SA Maritime Et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492, CA (refd)
Sally Wertheim v Chicoutimi Pulp Company [1911] AC 301, PC (refd)
Sharp v Loddington Ironstone Company Limited (1924) 132 LT 229, CA (refd)
Simmonds v Dowty Seals Ltd [1978] IRLR 211 (refd)
Sirius International Insurance Co (Publ) v FAI General Insurance Ltd & Ors [2005] 1 All ER 191, HL (refd)
Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co [1953] 1 WLR 1468, QBD (refd)
Strand Music Hall Company Limited ex p European, In re v American Finance Company (Limited) (1865) 35 Beav 153 (refd)
Tham Cheow Toh v Associated Metal Smelters Ltd [1972] 1 MLJ 171, FC (refd)
Universal Cargo Carriers Corporation v Citati [1957] 2 All ER 70 (refd)
Western Excavating (ECC) Ltd v Sharp [1978] QB 761; [1978] 1 All ER 713; [1978] 2 WLR 344, CA (folld)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ 45, SC (refd)

Legislation referred to

Evidence Act 1950 ss 9, 92, 114(g)
Industrial Relations Act 1967 s 20

Harcharan Singh (Isharidah, Ho, Chong & Menon) for the plaintiff.
Yong Hon Cheong (Zaid Ibrahim & Co) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] Learned counsel for the defendant was not too pleased with the narration of the historical background found in the plaintiff's witness statement marked as 'J' citing s 92 of the Evidence Act 1950 and it was his stand that the contract between the parties were in place and undisputed and so there was no necessity to recite the historical background relating to the defendant's company.

[2] But learned counsel for the plaintiff argued that s 92 of the Evidence Act 1950 did not apply because the introduction of the historical background did not in any way seek to contradict, vary, add or substract from the terms of the contract. According to learned counsel for the plaintiff the historical background sought to explain and introduce relevant facts pertaining to the options.

[3] I was of the view and I still hold the same view that the historical background would show how important the options were to the plaintiff and why the plaintiff felt that a breach of the term went to the root of the employment contract. Indeed s 9 of the Evidence Act 1950 would save the day for the plaintiff and render admissible the historical background.

[4] A perusal of s 9 of the Evidence Act 1950 would show that there are five categories wherein facts become relevant under this section, namely:

(1) facts that are necessary to explain or introduce a fact in issue or relevant fact; or

(2) facts which support or rebut an inference suggested by a fact in issue; or

(3) facts which establish the identity of anything or person whose identity is relevant; or

(4) facts which fix the time or place at which any fact in issue or relevant fact happened; or

(5) facts which show the relation of the parties by whom any such fact was transacted.

[5] The law books are replete with authorities pertaining to s 9 of the Evidence Act 1950. Perhaps I may be forgiven to cite a few of these authorities to fortify the importance of s 9 of the Evidence Act 1950:

(i) *Lim Seng Chuan v Public Prosecutor* [1977] 1 MLJ 171 at p 174;

(ii) *Public Prosecutor v Mustaffa bin Ahmad* [1986] 1 MLJ 302 at p 307;

(iii) *Ling Ngan Liong v Public Prosecutor* [1964] MLJ 20 at p 21;

(iv) *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423;

(v) *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 at p 9;

(vi) *Lai Ah Kam & Anor v Rex* [1939] MLJ 306 at p 307;

(vii) *Public Prosecutor v Kok Heng & 2 Ors* [1948] MLJ 171;

(viii) *Habee Bur Rahman v Public Prosecutor* [1971] 2 MLJ 194;

(ix) *Ong Lai Kim v PP and other appeals* [1991] 3 MLJ 111; and

(x) *Lakshmandas Chaganlal Bhatia and others v The State* AIR 1968 Bom 400 at p 420.

THE HISTORICAL BACKGROUND

[6] The defendant was previously known as Union Two Thousand Sdn Bhd. Initially, it was incorporated by the plaintiff with three other persons. That was sometime in December 1991.

[7] A change of events took place in February 1992 when the defendant employed the plaintiff as the defendant's creative director.

[8] Another interesting event that took place in 1997 was when a United States company known as Draftdirect Worldwide Inc purchased all the shares in the defendant including the plaintiff's shares and proceeded to change the defendant's name to its present name, viz, DraftWorldwide Sdn Bhd. The defendant then became a wholly-owned subsidiary of Draftdirect Worldwide Inc.

[9] The plaintiff, an Australian citizen, was given an incentive to remain with the defendant. A carrot was dangling before the plaintiff, so to speak, and that carrot was by way of a promise by Draftdirect Worldwide Inc to grant options to the plaintiff to purchase shares (hereinafter referred to as 'the options') in Inter Public Group of Companies, the parent company of Draftdirect Worldwide Inc (hereinafter referred to as 'the parent company') upon the terms set out in cl 5(b) of exh 'P1'.

[10] Clause 5(b) of exh 'P1' reads as follows:

> (b) DraftDirect will cause its corporate parent, The Interpublic Group of Companies, Inc. ('Interpublic') to make available to the Company's key employees designated in writing by the Company under Interpublic's then effective Stock Incentive Plan ('SIP') options to purchase an aggregate of three thousand (3,000) shares of Interpublic's common stock (less the number of such options made available pursuant to the Union Two Thousand Pte., Ltd. Singapore Shareholders Agreement). Such options shall be exercisable as follows:
>
> (i) forty (40) percent (%) after the third year anniversary of the date of grant (as defined under the SIP);
>
> (ii) thirty (30) percent (%) after the fourth year anniversary of the date of grant; and
>
> (iii) thirty (30) percent (%) after the fifth year anniversary of the date of grant.
>
> The exercise price of such options shall be the average of the high and low market price of the common shares as of the date of the grant. If any of such options which have been issued by the Company have been forfeited by an employee for any reason (other than as a result of the expiration of the term of such option), the Company may re-issue such forfeited or terminated option to another eligible employee.

[11] With that incentive, the plaintiff was enticed into submission and he continued to be employed as a creative director of the defendant notwithstanding the takeover and the change of name. It must be emphasised that, at this juncture, there was no formal contract of employment with the defendant.

[12] The witness statement of the plaintiff in bundle 'J' must be referred to because the whole scenario as alluded to above would be better appreciated. Questions 11 right up to 14 of the plaintiff's witness statement and the answers thereto would be very pertinent. I shall now reproduce them:

> Q11: What was your relationship with the Defendant?
>
> A11: In December 1991, together with a company called Wet Desert Sdn Bhd, and 2 others, I set up the Defendant company under the name Union Two Thousand Sdn Bhd, which employed me as Creative Director in February 1992. Subsequently, in 1997 Draftdirect Worldwide Inc., a company incorporated in the United States bought out our shares in the Defendant company and renamed it DraftWorldwide Sdn Bhd. The Defendant thus became a wholly-owned subsidiary of Draftdirect Worldwide Inc.

A Q12: Please refer to the Supplementary Non Agreed Bundle of Documents in Bundle 'C'. Can you tell the Court what this document is?

A12: This is a copy of (the) Sale and Purchase Agreement relating to the sale of shares in the Defendant company to Draftdirect Worldwide Inc. dated 10th March 1997.

B Q13: What happened to your employment with the Defendant after Draftdirect Worldwide Inc. took control of the Defendant in 1997?

A13: The Defendant continued to employ me as its Creative Director. As an incentive, the Sale and Purchase Agreement with Draftdirect Worldwide Inc. provided that I was to be granted options to purchase shares in the ultimate parent company of the Defendant, The Interpublic Group of Companies, Inc., a company incorporated in the United States as soon as practicable after the signing of the Sale and Purchase Agreement relating to the shares.

C Q14: Was there a formal contract of employment with the Defendant in 1997?

D A14: No.

[13] Interestingly, when the plaintiff took the stand and gave his evidence, the whole story about cl 5(b) of exh 'P1' surfaced. Under examination-in-chief, this was what the plaintiff said (see p 6 of the notes of evidence):

E In regard to Clause 5(b), when we signed the S&P Agreement an incentive was included in that agreement to encourage myself and other directors to continue on with the company after the sale. That incentive was that we be granted an option to purchase shares in the parent company — in the defendant, (the Inter Public Group of Companies) which is hosted on the New York Stock Exchange and the share options to be issued as soon as practicable after the signing of this agreement. In regard to Clause 5(b)(i),(ii) and (iii) — 40% of the options would be granted after the third year anniversary of the date of grant, then another 30% will be followed 12 months later. And a final 30% another 12 months later. These options were not granted as agreed.

[14] It is now obvious that the plaintiff was not granted the options to purchase shares in the parent company on the grounds that 'the grant would be given as soon as the plaintiff's formal employment contract was sorted out'. The plaintiff's witness statement in bundle 'J' would bear out these assertions particularly question 31 and the answer thereto. I shall now reproduce them:

I Q31: Did the Defendant make the necessary recommendation to Interpublic's Compensation Committee to grant to you the Options to purchase?

A31: No. Certainly, I have never been shown any such recommendation in writing. Further, if I may refer to page 22 of Agreed Bundle of Documents. Even as at 30.7.2001, Jerry Rajendram, the Defendant's then Managing Director, was

speaking of having to 'verify the same with our head office in USA before I can even comment any further on the issue'. This shows clearly that the Defendant had not even as at 30.7.2001 made any recommendation. Indeed, the issue relating to the Options was a long outstanding sore point since 1997. Nothing had been done over the years. Then the excuse was that the grant would be given as soon as my formal employment contract was sorted out. That took 3 years and 8 months, and, upon my insistence specific provision had been made for the Options in the employment agreement of 28.11.2000. Even so, for another 32 weeks thereafter despite my constant enquiries, nothing was done.

[15] In the course of the trial, it must be emphasised that this piece of evidence emanating from the plaintiff was not challenged in cross-examination.

[16] On 28 November 2000, a formal contract of employment was signed between the plaintiff and the defendant. The delay in signing the formal contract of employment calculated from the date when exh 'P1' was executed which was on 10 March 1997 was exactly three years, eight months and 18 days. I shall, for convenience, refer to the formal contract of employment as 'the employment agreement' which can be seen at pp 1–10 of the agreed bundle of documents marked as 'A'.

[17] Having waited for so long, the plaintiff was very cautious. He insisted that there should be a specific provision regarding the options to be incorporated in the employment agreement as reflected in the answer to question 31 as reproduced above. Once again, in the course of the trial, this piece of evidence was not challenged when the plaintiff was being cross-examined.

[18] Clause 6.01 of the employment agreement as seen at p 7 of the agreed bundle of documents marked as 'A' states as follows:

Incentive Compensation

6.01 The Company will recommend to Interpublic's Compensation Committee (the 'Committee') that the Committee grant to Executive, as soon as reasonably practicable after the full execution of this Agreement, options (the 'Options') to purchase an aggregate total of three thousand (3,000) shares of Interpublic common stock pursuant to, and subject to the terms of Interpublic's 1997 Performance Incentive Plan (the 'Plan'). The Options will be granted as 'Non-Statutory Stock Options' for purposes of, and shall otherwise be granted under, the Plan. Such Options shall be exercisable, forty percent (40%) after the first year anniversary of the grant date, thirty percent (30%) after the second year anniversary of the grant date, and thirty percent (30%) after the third year anniversary of the grant date. The exercise price of such Options shall be the fair

market value of the common stock as of the date of the grant. The Options shall not be treated as incentive stock options for purposes of Section 422 of the Internal Revenue Code of 1986, as amended.

[19] By way of a summary, the express terms in cl 6.01 of the employment agreement are as follows:

(1) the defendant will recommend to the parent company's compensation committee to grant to the plaintiff, as soon as reasonably practicable after the full execution of the employment agreement, options to purchase an aggregate total of 3,000 shares of the parent company ('the recommendation'); and

(2) such options shall be exercisable in this manner: 40% after the date of the first year anniversary of the grant date, 30% after the second year anniversary of the grant date and 30% after the third year anniversary of the grant date.

[20] So, it can be surmised that there are three parts to the defendant's contractual obligations with regard to cl 6.01 of the employment agreement pertaining to the options:

(i) firstly, it was the defendant who has to make the recommendation;

(ii) secondly, in making the recommendation the defendant has to act as soon as practicable after 28 November 2000; and

(iii) thirdly, the duty falls on the defendant to ensure that the grant of the options would be hinged on the terms that they were exercisable by the plaintiff in accordance with the percentages for the first year to the third year anniversaries of the grant date.

[21] It must be borne in mind that the terms of the employment agreement were subsequently supplemented by the defendant's letter dated 2 April 2001 as seen at pp 11–13 of the agreed bundle of documents marked as 'A' and it was worded as follows:

DRAFTWORLDWIDE SDN BHD

April 2nd, 2001

Mr. Alan Bohlsen

L1, Impian Emas

14 Jalan Kapas

Bangsar

59100 Kuala Lumpur

Dear Mr. Bohlsen,

RE: EMPLOYMENT CONTRACT FOR THE POST OF CREATIVE DIRECTOR

We are pleased to offer you employment as Creative Director with effect from April 9th, 2001 for a period of two years.

Your employment terms and conditions will follow normal Agency Employment Practices. In summary, your appointment details are as follows:

SALARY

Ringgit: RM17,000.00 per month

ANNUAL LEAVE

Leave is granted to all confirmed employees. Leave for an incomplete year will be calculated in proportion to period of service.

The leave eligibility is as follows:

- 28 days

PROFIT SHARING

At year end you will participate in a profit sharing programme. Profit sharing will be calculated on a percentage of profit before tax and distributed to all eligible staff.

EMPLOYEES' PROVIDENT FUND

Contributions by the company and yourself shall be in accordance with the current law.

INCOME TAX DEDUCTION

Deductions from your salary monthly shall be in accordance with the current law.

MEDICAL

Medical consultation and treatment will be provided for yourself by the company's appointed panel of doctors (or specialists on recommendation of the company's appointed doctors).

You will be included into the company's Hospitalisation and Surgical Insurance scheme.

POSITION REQUIREMENT AND DESCRIPTION

You will be responsible for:

(a) The entire Creative output of the agency.

(b) Training of existing staff.

(c) Training an understudy to take over the role of C.D.

NOTICE OF TERMINATION

Either party may give to the order Four (4) months' notice in writing to the end of a calendar month or paying the equivalent of Four (4) months' salary in lieu.

HOURS OF WORK

Your hours of work are as follows:

Mondays to Fridays: 9.00 a.m. – 5.30 p.m.

However, you may be required to work beyond the regular hours from time to time.

CONFIDENTIALITY

As you will be working closely with the Agency's Clients, you will constantly come across matters of great confidentiality. You are required to maintain strict confidentiality over such matters.

Yours sincerely,

Sgd.: (Illegible)

Jerry Rajendram

Managing Director

I understand and agree with the above terms and conditions.

Signature: Sgd.(Illegible)

Date: 2/4/2001.

[22] With this new development, the employment agreement must now be read together with the defendant's letter dated 2 April 2001 and they will now be referred collectively as 'the contract'.

[23] In addition to and by way of amplification to the express terms relating to the options as set out above, the relevant terms of the contract have been amply set out in the statement of agreed facts marked as bundle 'F' particularly at paras 3–4 thereto. And the relevant terms of the contract may be stated as follows:

(1) that the plaintiff would be employed for two years from 9 April 2001 as a creative director on a basic salary of RM17,000 per month;

(2) that the plaintiff would be entitled to an annual home leave allowance not exceeding RM15,000pa;

(3) that the plaintiff would be entitled to an annual housing rental not exceeding RM39,000pa;

(4) that the plaintiff would be entitled to an annual club membership and fees not exceeding RM13,000pa;

(5) that the defendant would make contributions to the employees' provident fund on the plaintiff's behalf;

(6) that the defendant would pay the plaintiff's telephone bills;

(7) that the defendant would pay the plaintiff's automobile expenses — petrol, car parking charges and maintenance charges;

(8) that the defendant would maintain trust and confidence in the plaintiff;

(9) that the plaintiff and his staff in the creative department would have reasonable access to all equipments and facilities necessary for the plaintiff and his staff to carry out their duties; and finally

(10) either party, be it the plaintiff or the defendant, could terminate the contract by giving four (4) months' notice or by paying an equivalent of four (4) months' salary in lieu of notice.

THE CENTRAL ISSUES

[24] Before me, by way of a full trial, the plaintiff's claim is for damages arising out of the defendant's breach of the contract. It is the plaintiff's contention that the defendant has breached the contract in several aspects and that the defendant has repudiated the contract, which repudiation the plaintiff has accepted. However, the defendant denies the repudiatory breaches and contends that the plaintiff has on his own accord terminated the contract prematurely and, consequently, the defendant advances a counterclaim of four months' salary in lieu of notice.

CONTRUCTIVE DISMlSSAL

[25] Common law judges have explained and defined the meaning to be attached to the words 'constructive dismissal' in a variety of ways. Benefitting from these precedents, I can safely say that where the employee on his own accord terminates the contract, with or without notice, in circumstances that he is entitled to terminate it without notice by reason of the employer's conduct, this is what is known as a 'constructive dismissal'.

[26] One must bear in mind that although the employee resigns, it is the employer's conduct which sparks off and which constitutes a repudiation of the contract, and the employee merely accepts that repudiation by resigning. But there is one proviso. It is this. That the employee must clearly indicate that he is treating the contract as having been repudiated by the employer (*Logabax Ltd v R H Titherley* [1977] ICR 369; [1977] IRLR 97; 12 ITR 158), and if the employee fails to do so, by word or conduct, he is not entitled to claim that he has been constructively dismissed (*Holland v Glendale Industrial Ltd* [1998] ICR 493). Here, the plaintiff had sent a letter dated 19 July 2001 to the defendant giving the defendant seven days to rectify the breaches, failing which the plaintiff would consider himself to have been repudiated by

A the defendant. This was followed by another letter dated 27 July 2001, which the plaintiff sent to the defendant and by this letter the plaintiff considered himself to be constructively dismissed. I will allude to these two letters in the later part of this judgment. Suffice for me to say that the plaintiff had complied with the law before he considered himself as being constructively
B dismissed by the defendant.

[27] The Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; [1978] 1 All ER 713; [1978] 2 WLR 344 (CA), held that the test for constructive dismissal was to be determined by the contract test of, 'Did
C the employer's conduct amount to a breach of contract which entitled the employee to resign?' The court rejected the 'unreasonable conduct' theory because it would lead to a finding of constructive dismissal on the most whimsical grounds.

D

[28] I say that only in those cases where the employer's conduct amounts to a significant breach, going to the root of the contract, would the employee be entitled to resign and claim for constructive dismissal. Thus, if the employer tries to impose a unilateral change in the employment terms, such
E as a change in the job, or a significant change in hours (*Simmonds v Dowty Seals Ltd* [1978] IRLR 211) or a lowering in earnings (*Hill (RF) Ltd v Mooney* [1981] IRLR 258) or a significant change in the location of employment (*Courtaulds Northern Spinning Ltd v Sibson & Transport & General Workers Union* [1987] ICR 329, reversed vide [1988] ICR 451; [1988] IRLR 305;
F 132 Sol Jo 1033 (CA)) or a demotion, then provided that there is no contractual right to do so, such conduct would certainly entitle the employee to resign.

[29] It would not be out of place to mention, indeed it is appropriate to
G emphasise that although a constructive dismissal may amount to a dismissal in law, the question of whether the dismissal is fair or unfair has to be determined by looking at the facts of the case.

[30] The phrase 'constructive dismissal' is not defined in the Industrial
H Relations Act 1967. The definition which I set out earlier is the appropriate definition to adopt. The case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ 45, decided by the Supreme Court, should be referred to. There the Supreme Court had to consider an important question of law, namely, whether the doctrine of constructive dismissal comes
I within the ambit of s 20 of the Industrial Relations Act 1967. The Supreme Court answered the question in the affirmative and held that it would be a dismissal if the employer is guilty of a breach which goes to the root of the contract or if the employer has evinced an intention to be no longer bound by the contract.

[31] The phrase 'constructive dismissal' do not give the employee the right to automatically terminate the contract when his employer had acted or behaved unreasonably towards him. Only when the employer's wrongful conduct is serious, amounting to a fundamental breach of the contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract, would the employee be entitled to consider himself as constructively dismissed. It is here that the court must be vigilant and ascertain whether a single act or a series of acts may, according to the circumstances of a given case, amount to a constructive dismissal.

[32] It must be emphasised that only the actual conduct of the employer and not the perception of the employer's conduct by the employee that can support a case of constructive dismissal. So, the employee's personal opinion or subjective reaction to the change is irrelevant. An objective view point is preferred in that whether speaking objectively the change by the employer to the employee was so fundamental that the employee can regard himself as constructively dismissed.

[33] I must reiterate that the contract test enunciated by the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* is the right test to apply. There, it was decided that the test for constructive dismissal was contractual in nature, namely, whether the employer's conduct amounted to a fundamental breach or repudiation of the contract of employment by the employer.

TERMINATION OF THE CONTRACT

[34] Earlier I said that I would allude to the plaintiff's two letters to the defendant dated 19 July 2001 and 27 July 2001 and I shall do so now. There is a letter dated 19 July 2001 from the plaintiff to the defendant wherein the plaintiff alluded to the breaches of the contract and requiring the defendant to rectify the breaches within seven days failing which the plaintiff would accept it to be the defendant's repudiation of the contract. That letter can be seen at pp 14–16 of the agreed bundle of documents marked 'A' and it was worded as follows:

July 19, 2001

Jerry Rajendram

Managing Director

DraftWorldwide Sdn Bhd

C-11-12 Plaza Mont Kiara

2 Jalan 1/70C Mont Kiara

50480 Kuala Lumpur

A Re: Breaches of Employment Agreement between DraftWorldwide Sdn Bhd and Alan Bohlsen

Dear Jerry,

Despite repeated requests to the company to have my Employment Agreement honoured, I am still in a position where none of the items I have mentioned both to you and Greg Paul have been honoured or rectified.

Specifically, I am referring to IPG share options that were promised as far back as November 28th last year, my EPF which was promised but has never been given and the payment of my expenses which has been unsatisfactory. By 'unsatisfactory' I mean that some of my telephone bills, hand phone bills and car expenses relating to petrol have not been paid on time, resulting in severe embarrassment to me and great inconvenience when telephones have been 'cut off' as a result of non-payment and my BP petrol card has been declined on at least two occasions recently because the company had either not paid the bill or had exceeded its credit limit.

My position as Creative Director and the quality, speed and volume of work being produced by my department has been seriously undermined by the apparent accession to power by Suan Choo who now controls hardware and software in the creative department among other things. Since she is in charge of the maintenance of equipment, she therefore has (the) sole discretion to approve the purchase of badly-needed software from the USA as well as taking charge of the installation of internet access. She now has total control of the creative software and its storage. No member of the creative department, including myself has access to this software.

In the event of a computer crash, which happens frequently, we may not be able to re-install urgently.

As far as internet access goes, the first people who need access to the internet are the writers and artists, yet none of my staff, with the exception of Po Wen has been given internet access to help them in downloading images, information, logos, reference pictures, corporate images, type styles and other important material to help them do a better job, with more speed and more efficiency. I believe the existing connections in the agency are 'dial-up' which is also a decision made through lack of knowledge. Dial up connections could cost the agency about nine times the cost of a leased line, not to mention the drop outs and re-dials that add to the cost. I also believe we have a total of 31 telephone lines, enough for a staff of 300 people. Yet our projected staff total is about one-tenth of that number. The cost of these lines must be astronomical. Once again this seems to be a decision made by someone with very little experience in these matters.

Why am I concerned with costs? Because as part of my Employment Agreement there is provision for an annual bonus. With the amount of money that appears to have been wasted over the past nine months, there seems little, if any chance of receiving a bonus. Therefore costs do concern me.

This morning, after 3 days without a scanner, Suan Choo was still unable to offer us an alternative. It looks like our clients will have to suffer at least another week of downtime. This is a great way to LOSE clients.

These inefficiencies and difficulties have a direct bearing on my ability to perform to the highest standards as required in the Employment Agreement. I don't believe the company is adhering to its side of the Employment Agreement by impeding my work in so many ways.

As far as the earlier matters that I mentioned, i.e. Share Options, EPF and the unsatisfactory payment at times of the expenses portion of my salary package, I am now asking the company to rectify all of the matters directly relating to my Employment Agreement within 7 days of today's date, 19th July 2001, failing which I will have no alternative but to accept the company's failure to rectify the above matters as a repudiation of this Employment Agreement and the company will be liable to me for all damages and losses that I may suffer.

Yours sincerely,

Sgd.: (Illegible)

Alan Bohlsen

Creative Director.

[35] The defendant played possum and did not respond to the plaintiff's letter dated 19 July 2001 within the seven days' time period.

[36] This must have been the final straw that broke the camel's back. The plaintiff then issued another letter dated 27 July 2001 where the plaintiff intimated that he accepted the defendant's repudiation. This meant that the contract between the parties came to an end on 27 July 2001. The letter can be seen at p 17 of the agreed bundle of documents marked 'A' and it was written in this way:

July 27, 2001

Jerry Rajendram

Managing Director

DraftWorldwide Sdn Bhd

C-11-12 Plaza Mont Kiara

2 Jalan 1/70C Mont Kiara

50480 Kuala Lumpur

Re: Failure to rectify Breaches of Employment Agreement between DraftWorldwide Sdn Bhd and Alan Bohlsen dated 28th November 2000

Dear Jerry,

After waiting thirty two weeks to have the above mentioned Employment Agreement honoured and repeatedly asking for a number of important financial promises to be kept, I handed you a notice last Thursday, 19th June 2001, giving you seven days to remedy the breaches.

As you have failed to reply to this notice and failed to rectify the issues stated within the said seven days, please be advised that the above Employment Agreement between myself, Alan Thomas Bohlsen and DraftWorldwide Sdn Bhd is hereby terminated with effect from today.

I reserve my right to take action against DraftWorldwide Sdn Bhd for all damages and losses that I may suffer or have suffered as a result of DraftWorldwide's failure to honour the Employment Agreement made between us on 28th November 2000.

Yours sincerely,

Sgd.: (Illegible)

Alan Bohlsen

Creative Director.

[37] On 30 July 2001, the plaintiff attended a half hour meeting at the defendant's office to discuss work in progress, just like any responsible ex employee would, but he left immediately at its conclusion. The cross-examination of Anthony Jerard a/l Rajendran (DW1) ('Anthony Jerard') who gave evidence for the defendant as reflected at p 52 of the notes of evidence would show that brief meeting on 30 July 2001.

[38] Now, the defendant's first response to the plaintiff's letters dated 19 July 2001 and 27 July 2001 was on 30 July 2001. It was too late in the day because on 27 July 2001 the plaintiff had accepted the defendant's repudiation and the plaintiff considered himself to be constructively dismissed. Anthony Jerard as the managing director of the defendant wrote a letter dated 30 July 2001 to the plaintiff by way of a response and that letter can be seen at pp 22–23 of the agreed bundle of documents marked 'A' and this was what he wrote:

DRAFTWORLDWIDE SDN BHD

July 30, 2001

Dear Alan,

RE: FAILURE TO RECTIFY BREACHES OF EMPLOYMENT AGREEMENT BETWEEN DRAFTWORLDWIDE SDN BHD AND ALAN BOHLSEN DATED 28th NOVEMBER 2000

I refer to your letter dated 27 July 2001 in respect of the above matter. I am shocked and surprised to note the stand taken by you in respect of your employment agreement with the Company.

As you are aware, I have agreed to meet you on Wednesday, 1 August 2001 to discuss the various issues raised in your letter to me dated 19 July 2001. On behalf of the Company, I am unable to agree with your contention that we have breached the terms of your employment agreement. The EPF contribution was never an

issue as you did not comply with the provisions of the EPF Act 1991 by giving us the requisite notice within the specific time frame stipulated of your intention to be a member of the fund.

In respect of the share option, I have to verify the same with our head office in USA before I can even comment any further on the issue particularly bearing in mind the fact that I only joined the organisation on 18th October 2000. In respect of the BP Petrol Card, you were copied a notification we received from BP Malaysia Sdn Bhd dated 19 June 2001 in respect of the disruption in usage of the BP Fleet card. I am therefore surprised to see you make this an issue.

In respect of your telephone bills, you are well aware that we shifted premises on 21 January 2001 and your bills were not updated in respect of the address change. This ought to have been handled by your secretary or your-self. I as the Managing Director cannot be expected to sort out such administrative issues on your behalf.

In respect of your Maxis mobile account, the records indicate that the credit limit was exceeded during the period 7 July 2001 to 20 July 2001. The credit limit of RM800.00 was applied by your good self and the same was also exceeded to the amount of RM951.29 by your good self resulting in Maxis notifying us that the line had been barred. We have taken steps to increase your credit limit to RM2,000.00 sometime last week in order for you to continue to enjoy the benefits of the said facility.

In respect of the internet facilities within the organisation, kindly be informed that (the) management has the prerogative to decide who has access to the same. You were never denied or deprived of such a benefit and as a matter of fact, your account has been maintained by the Company.

In the circumstances, I regret your statement that the Company has breached your contract of employment and wish to put on record that we deny your contentions as reflected in your letters dated 19 July 2001 and 27 July 2001. I note that you were absent from the office on Friday, 27 July 2001. You however attended the work in progress meeting which went on this morning.

I look forward to speaking to you on the matters raised on Wednesday, 1 August 2001.

Yours sincerely

Sgd.: (Illegible)

Jerry Rajendram

Managing Director/Regional Planning Director.

[39] Of course, it is not surprising that Anthony Jerard's letter dated 30 July 2001 purported to exculpate completely the defendant. That letter too showed that he did not understand that the plaintiff was already constructively dismissed.

[40] Anthony Jerard's letter dated 30 July 2001 and his answer to question

12 of his own witness statement in the bundle marked 'L' certainly provoked criticisms. At p 3 in the bundle marked 'L', Anthony Jerard said in his witness statement:

> 12 What was your reaction when you received the letter of 27 July 2001 (p 17 of the agreed bundle of documents)?
>
> I was to say the least very shocked to have received the letter of 27 July 2001 from the plaintiff. I had already agreed to meet with him to discuss the issues he raised but instead of waiting for the meeting, he sent the letter of 27 July 2001 terminating his own employment.

[41] It purportedly gave the impression that the meeting on 1 August 2001 was arranged before the plaintiff issued the letter dated 27 July 2001, which when seen in the wrong perspective would give the impression that the plaintiff had acted unreasonably in issuing his letter dated 27 July 2001 whereby he had accepted the defendant's repudiation. But, unfortunately, there was no clear evidence as to when this meeting of 1 August 2001 was arranged or who had arranged it. The following observations would be pertinent:

(i) neither Anthony Jerard's letter dated 30 July 2001 nor his evidence-in-chief via his witness statement stated when this meeting on 1 August 2001 was arranged;

(ii) under cross-examination, it was put to Anthony Jerard that the meeting on 1 August 2001 was arranged after the meeting on 30 July 2001, and he responded by saying (see p 53 of the notes of evidence): 'It was arranged by my superior on 1 August 2007, the name of my superior is Greg Paul'.

(iii) bearing in mind that the plaintiff was not cross-examined as to when the meeting of 1 August 2001 was arranged, it can be deduced that the meeting of 1 August 2001 was arranged after the plaintiff had issued the letter dated 27 July 2001; and

(iv) be that as it may, the plaintiff met Anthony Jerard on 1 August 2001 and during that meeting the plaintiff was told to 'clear out'.

WHAT WERE THE DEFENDANT'S BREACHES?

[42] The defendant's failure to comply with all the three limbs of cl 6.01 of the employment agreement was the plaintiff's main grievance. This finds support in the plaintiff's witness statement at question 47 and the answer thereto:

Q47: What effect did the aforesaid breaches of contract by the defendant have on you? A

A47: By July 2001, I realised that the defendant was not going to do anything about the situation, especially my main grievance regarding the options. I thought my letter of 19 July 2001 might possibly elicit some positive response. But it was not to be. So I accepted the defendant's repudiation of my employment agreement, and I was dismissed. B

[43] It cannot be denied that the defendant had failed to make the necessary recommendation to the compensation committee of the parent company which would ensure that the plaintiff be granted the options in accordance with the express terms of cl 6.01 of the employment agreement. C

[44] No evidence was led to show that the defendant had made the necessary recommendation as soon as reasonably practicable after the execution of the employment agreement or not at all. It must be emphasised that the defendant did not even attempt to lead any evidence orally or show by way of documentary proof: D

(1) that the recommendation was ever made; E

(2) that if the recommendation was ever made, it was made within a reasonable time; and

(3) that the defendant had made a concerted effort in ensuring that the options when granted would be exercisable in accordance with the agreed time schedule as set out in cl 6.01 of the employment agreement. F

[45] Under cross-examination, Anthony Jerard confirmed that he did not make any recommendation for the benefit of the plaintiff to the parent company. The notes of evidence at p 38 reminded us that Anthony Jerard did not make that recommendation that would benefit the plaintiff. The exchange went like this: G

Q: Did you in your capacity as the managing director of the defendant's company make recommendation to the defendant's company in USA that the plaintiff be granted an option to purchase the shares in the USA parent company? H

A: No.

[46] Anthony Jerard tried to justify his omission by stating that he had no authority and that the issue of the options was entirely between the plaintiff and the USA office. This was what he said when he was cross-examined at p 45 of the notes of evidence: I

A Q: My instructions are that in fact the plaintiff complained to you directly and to the defendant's company's accountant that there was no progress on the recommendation for the option to purchase shares and that this complaint was made from time to time?

B A: Yes, the plaintiff did raise and complain with regards to the share option and I made it very clear that I had no authority or was any part of its original agreement and contractual agreement between the plaintiff and the USA office. However, I did as my responsibility refer the plaintiff's concerns to my regional head Mr. Greg Paul.

C

[47] With respect, what Anthony Jerard said cannot be accepted. They are untenable.

[48] The alleged lack of authority on the part of Anthony Jerard — the
D managing director of the defendant, cannot be accepted by this court. He was the only director based in Malaysia. Three observations must be made here.

[49] Firstly, unless expressly forbidden, it would be appropriate to hold the
E view that Anthony Jerard was in a position to make the necessary recommendation bearing in mind the position he held in the defendant. It would certainly be within the scope of his duties and powers.

[50] Secondly, there was no evidence be it documentary or otherwise to
F show that Anthony Jerard's authority was circumscribed or restricted. What we have was Anthony Jerard's own self-serving oral testimony which was, in any event, vigorously challenged in cross-examination (see p 39 of the notes of evidence).

G **[51]** Thirdly, according to Anthony Jerard, it was Greg Paul who was based in Singapore who had the requisite authority to make the recommendation (see p 39 of the notes of evidence). But the defendant did not call Greg Paul as a witness and I would not hesitate to make an inference adverse to the defendant pursuant to s 114(g) of the Evidence Act 1950 (*Chua Kim Suan v*
H *Ang Mek Chong* [1988] 3 MLJ 231; *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; *Public Prosecutor v Chew Yoo Choi* [1990] 2 MLJ 444).

I

[52] The Singapore based Greg Paul could have been produced and called to testify by the defendant. But, alas this was not done. It was a pure case of withholding evidence by not calling Greg Paul. In *Public Prosecutor v Guan Sheng Trading Sdn Bhd* [1997] 4 MLJ 20, I emphasised that an adverse

inference can only be drawn if there was withholding of evidence and not merely on account of the failure to obtain evidence.

[53] To be fair to Anthony Jerard, he confirmed in cross-examination that he was not personally aware whether the elusive Greg Paul or any of the other directors of the defendant did make the recommendation for the benefit of the plaintiff. At p 43 of the notes of evidence, this was what Anthony Jerard said under cross-examination:

> Q: Are you personally aware whether any directors in USA made any recommendation relating to the grant of the share option to the plaintiff?
>
> A: I believe that Mr Greg Paul did. I personally am not aware.
>
> Q: You believe Mr. Greg Paul did the recommendation?
>
> A: I believe so.
>
> Q: Will Mr Greg Paul come to court to give evidence?
>
> A: I am not aware.

[54] Greg Paul was the man in charge of this region. Even Anthony Jerard had to report to Greg Paul. In my judgment, Greg Paul should have been called by the defendant because he would be in a position to explain and assist the court in regard to the issue of recommendation. Under cross-examination, Anthony Jerard also alluded to the existence of the other directors of the defendant's company. The evidence recorded during cross-examination can be seen at p 38 of the notes of evidence and it was worded in this way:

> Q: During your tenure as the defendant's company's managing director were there any directors of the board of Directors?
>
> A: Yes, I reported to the regional director by the name of Mr. Greg Paul. In Malaysia, the defendant's company had only 2 directors Greg and myself. The rest of the directors are in the United States of America.
>
> Q: How many directors were there in the defendant's company when you were the managing director?
>
> A: I cannot recall exactly the draft worldwide of Chicago, but I do recall the 2 or 3 people whom I refer to, i.e. Mr. Greg Paul, Mr. Peter Davis, Mr. Jordan Rednor and Mr. Howard Draft. It is 4 people.
>
> Q: Were Mr. Greg Paul, Mr. Peter Davis, Mr. Jordan Rednor and Mr. Howard Draft members of the board of directors of the defendant's company?
>
> A: I believe so.

[55] Three days after the plaintiff had considered himself to be

constructively dismissed, and that would be on 30 July 2001, Anthony Jerard was still in the dark. He had no clue whether or not the recommendation for the benefit of the plaintiff had been made. In his letter dated 30 July 2001 addressed to the plaintiff as found at p 22 of the agreed bundle of documents at the third paragraph, Anthony Jerard said:

> In respect of the share option, I have to verify the same with our head office in USA before I can even comment any further on the issue particularly bearing in mind the fact that I only joined the organisation on 18 October 2000.

[56] Anthony Jerard said under cross-examination that he had no part to play in regard to the 'contractual agreement between the plaintiff and the USA office' (see p 45 of the notes of evidence). My response to his evidence would be as follows:

(i) he must have thought, albeit wrongly that the obligation to recommend was not vested in the defendant and because of that he did nothing about it;

(ii) but, with respect, he failed to appreciate the plaintiff's contract with the defendant dated 28 November 2000 styled as the employment agreement as seen at pp 1–10 of the agreed bundle of documents and this contract was not signed with any other entity except with the defendant; and

(iii) so it can be surmised that as the managing director of the defendant it was Anthony Jerard's responsibility to ensure that the defendant fulfilled all its obligations which would necessarily include all its contractual obligations with the plaintiff.

[57] It has been said, time and again, that in construing a contract all parts of the contract must be given effect where possible and that no part of the contract should be treated as inoperative or as mere surplusage. In the words of Lord Romilly MR in the case of *In re Strand Music Hall Company Limited ex p European v American Finance Company (Limited)* (1865) 35 Beav 153 at p 853:

> The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed.

[58] Somervell LJ in *SA Maritime Et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1954] 1 WLR 492 at p 495 aptly said:

> Although one finds surplusage in contracts and deeds and in Acts of Parliament one leans towards treating words as adding something rather than as mere surplusage.

[59] The nonchalant attitude of Anthony Jerard as the managing director of the defendant was detrimental to the plaintiff in the context of the recommendation. The plaintiff must have expected Anthony Jerard to act for the benefit of the plaintiff by making that recommendation. The plaintiff was reasonably entitled to conclude that from the attitude adopted by Anthony Jerard, that recommendation was not forthcoming. Indeed a similar stand was adopted by Lord Reid in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 at p 128 when His Lordship adopted the following passage from *Gloag on Contracts* (2nd Ed, 1985) at p 7:

> The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.

[60] In interpreting cl 6.01 of the employment agreement, one must lay emphasis on the objectivity of the exercise. While it is true that the purpose of the construction of a contract is to give effect to the intention of the parties, our law of construction is based on the objective theory. It is to ascertain the contextual meaning of cl 6.01 of the employment agreement. Intention, therefore, must be determined by reference to the expressed wording of the said clause (*John v Price Waterhouse Coopers (formerly Price Waterhouse)* [2002] EWCA Civ 899; and *Morrells of Oxford Ltd v Oxford United Football Club Ltd & Ors* [2001] Ch 459). Lord Steyn in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd & Ors* [2005] 1 All ER 191 at p 200 aptly said:

> The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

[61] I have no difficulty in interpreting cl 6.01 of the employment agreement. It imposes the burden onto the defendant to make the recommendation 'as soon as reasonably practicable'. It envisages that something must be done, a positive act and it must be done as soon as reasonably practicable. It goes without saying that it has to be construed sensibly and regard must be had to its practical effect (*President of India v Jebsens (UK) Ltd & Ors (The 'General Capinpin', 'Proteus', 'Free Wave' And 'Dinara')* [1989] 1 Lloyd's Rep 232 (CA)).

[62] It must be recalled that on 27 July 2001, the plaintiff considered himself to be constructively dismissed. Yet, on 30 July 2001, the plaintiff received a letter from Peter M Davis, the senior vice president and corporate counsel for Draftworldwide Inc informing the plaintiff that he had been granted the options to purchase 3,000 shares. It certainly came as a surprise to the plaintiff. The witness statement of the plaintiff at pp 9–12 explained the position better. The questions and the answers in the plaintiff's witness statement chronicled the breach of the fundamental term of the contract particularly cl 6.01 of the employment agreement in all its splendour. I shall now refer to the plaintiff's witness statement:

> Q32: Did you make any written enquiries regarding the grant of the Options to the Defendant between 1997 till the time of the termination of your employment?
>
> A32: No, because I was always given verbal assurances that the matter was being looked into and that I could expect a resolution of the matter soon. Quite insidiously, days stretched to more than 4 years.
>
> Q33: What did you do in July 2001?
>
> A33: By July 2001 I realised that I was not getting anywhere with the Defendant. Their verbal assurances, as before, were mere empty promises. Besides, I also had other unresolved grievances regarding other breaches of my employment agreement, which made my situation intolerable. I found the whole situation intolerable. I, therefore, issued the letter, dated 19.7.2001, to the Defendant referred to earlier, which led to my being fired.
>
> Q34: What happened after you were fired?
>
> A34: Strangely, on 30.7.2001, I received a letter from DraftWorldwide Inc, (new name, same company) saying that I had been granted the Options to purchase 3,000 shares of Interpublic Common Stock upon the terms set out in the letter and the Option Certificate enclosed therewith.
>
> Q35: Please refer to pages 20, 21, 21A–21D of the Agreed Bundle of Documents and explain what these documents are.
>
> A35: Page 20 is the letter of 30.7.2001 that I referred to just now. Page 21 is the Option Certificate that I referred to just now, and pages 21A–21D set out the terms and conditions of the grant of the Options.
>
> Q36: What was the date of the so-called grant of the Options?
>
> A36: According to the letter dated 30.7.2001 it was 9.5.2001.
>
> Q37: Were you ever, prior to the letter of 30.7.2001, notified of the so-called grant of the Options to you?
>
> A37: No.
>
> Q38: Did the Defendant inform you verbally of the so-called grant at any time prior to the termination of your employment agreement?
>
> A38: No, they did not.

Q39: So, the first time you ever knew of a purported grant of the Options was after your employment had been terminated? A

A39: Yes.

Q40: Were the terms of the purported grant the same as or different to the terms contained in your employment agreement dated 28.11.2000? B

A40: The terms were different.

Q41: What was the difference?

A41: The difference was in the timing of my right to exercise the Options. Under my employment agreement I could exercise the first option to purchase 40% of the shares after the first anniversary of the grant, but under the purported grant I could do so only after the third anniversary of the grant. Similarly, the timing in respect of the remaining 60% of the shares was not in accordance with my employment agreement. C

Q42: Assuming that you had knowledge of it before your employment was terminated, would you have regarded the purported grant as complying with your employment agreement? D

A42: Of course not. It did not comply with my employment agreement.

Q43: What did you do after receiving the purported grant?

A43: I issued a letter to DraftWorldwide informing them essentially that the purported grant was not upon the agreed terms and, in any event, it had come too late as my employment had already been terminated. And I returned the Stock Option Certificate un-signed. E

[63] In English law, the terms of a contract have been classified as 'conditions' or 'warranties'. A breach of a condition entitles the innocent party to treat himself as being discharged from further performance under the contract and may claim for damages for loss sustained by virtue of the breach. Whereas, a breach of warranty does not entitle him to treat himself from being discharged but he can only claim for damages. F G

[64] There is a third classification of the terms of a contract. It is known as the 'intermediate' term and it is a dichotomy between 'conditions' and 'warranties'. It is the failure to perform the contract which may entitle the innocent party to treat himself as discharged depending, of course, on the nature and consequences of the breach (*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Cehave NV v Bremer Handelsgesellschaft mbH The Hansa Nord* [1976] QB 44 at p 60; *Bremer Handelsgesellschaft Schaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at p 113; *Bunge Corporation New York v Tradex Export SA Panama* [1981] 1 WLR 711 at pp 715, 719; *Aktion Maritime Corporation of Liberia v S Kasmas & Brothers Ltd & Ors (The 'Aktion')* [1987] 1 Lloyd's Rep 283; and *Phibro Energy AG v Nissho Iwai Corporation & Anor* [1987] Folio No 1232). H I

[65] There is a fourth classification, and the law recognises it as the 'fundamental term'. It is described as the core of the contract (*Alderslade v Hendon Laundry, Limited* [1945] KB 189 at p 192). And the non-performance of the core of the contract destroys the very rubric or substance of the contract. Devlin J in *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 1 WLR 1468 at p 1470 described it as 'something … narrower than a condition of the contract' and as 'something which underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates'. In short, you get something different from what you have contracted for. Thus, like the case of *Chanter v Hopkins* [1835–1842] All ER Rep 346, beans were delivered instead of peas. And in the case of *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* pinewood logs were delivered instead of mahogany logs. In these cases, we can easily discern that there was a breach of the fundamental term in that the 'core' obligation to deliver the correct goods was not done.

[66] Likewise here, the core obligation of the defendant under cl 6.01 of the employment agreement was not fulfilled by the defendant. The breach of this central critical obligation must surely be classified as a breach of the fundamental term. It is advisable to read the judgments of Gopal Sri Ram JCA (now FCJ) in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 (CA) and *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500 (CA).

[67] Now, the letter from Peter M Davis, the senior vice president and corporate counsel for Draftworldwide Inc can be seen at p 20 of the agreed bundle of documents and it was worded as follows:

> DRAFTWORLDWIDE
>
> 633 Norch St. Clair Street
>
> Chicago, Illinois 60611
>
> P/312. 944.3500
>
> F/312. 944.0165
>
> www.draftworldwide.com
>
> July 25, 2001
>
> PERSONAL AND CONFIDENTIAL
>
> Alan Bohlsen DraftWorldwide Sdn. Bhd.
>
> No. C-11-07 to C--, Block Plaza Mont Kiara
>
> 2 Jalan 1/70C, Off Jalan Bukit Kiara,

Mont Kiara 50480 Kuala Lumpur.

Re: Performance Incentive Plan – IPG Stock Options

Dear Alan:

You are aware of our continual goal to provide key people like yourself with the opportunity to build equity in Interpublic. The Performance Incentive Plan was established to help fulfill this goal. Our attempt to build internal equity also relies much on our executives accumulating and keeping their IPG shares over the long term.

We are pleased to inform you that you were granted on May 9, 2001 a stock option of 3,000 shares of Interpublic Common Stock at a price of $35.4250. This option price is 100% of the average value of Interpublic Common on May 9, 2001.

You are eligible to exercise your new 2001 stock option grant by purchasing the shares in three annual installments beginning May 9, 2004. On that date you can exercise up to 40% of the shares covered by the option. An additional 30% will become exercisable on or after May 9, 2005 and the final 30% may be exercised on or after May 9, 2006. You can elect to exercise your option in full any time after the initial five years and before May 9, 2011, the expiration of the option. Should your employment terminate, any unvested/unexercised options will be forfeited, except as otherwise provided in your Option Certificate. Please read your Option Certificate carefully as it explains more fully your rights to exercise this option. It is our sincere desire that when you exercise your option, you will not sell the shares but retain them in your financial portfolio.

Enclosed please find the original and one photocopy (first page only) of your Option Certificate. Please sign the photocopy of the Option Certificate and return it to me. Congratulations. We are delighted to include you in this special Incentive Plan. Obviously, by maintaining our momentum and productivity, as equity owners, we will all continue to benefit significantly.

Best regards,

Sgd.: (Illegible)

Peter M. Davis

Senior Vice President

and Corporate Counsel.

[68] And the option certificate was drafted in this way (see p 21 of the agreed bundle of documents):

THE INTERPUBLIC GROUP OF COMPANIES, INC. 1997 PERFORMANCE INCENTIVE PLAN ('the Plan')

1997 PLAN OPTION CERTIFICATE

THIS DOCUMENT IS IMPORTANT AND SHOULD BE KEPT IN A SAFE PLACE

A THIS IS TO CERTIFY that, on the date shown below, an Option was granted, subject to the Rules of the above-mentioned Plan, to the under-mentioned to subscribe at the Exercise Price stated below the number of shares of Common Stock of The Interpublic Group of Companies, Inc. specified below.

Grantee: Name: Alan Bohlsen

B

Date of Grant: May 9, 2001

Number of shares of Common Stock Subject to the Option: 3,000

Exercise Price per share: $35.4250 (US currency)

C Option Expiration Date: May 9, 2011

The Option may not be exercised in any part for a period of three years from the date of granting hereof. Thereafter the Option shall be exercisable in three annual installments. The first installment shall be for 40% of the number of shares covered by the Option. Each succeeding installment shall be for 30% of the number of

D shares covered by the Option. The first installment may be exercised on or after the third anniversary date hereof, and each of the two additional installments may be exercised on or after each successive anniversary date. To the extent that any installment hereof has become exercisable, it may be exercised at any time prior to the expiration of the Option as provided in the attached Exhibit A.

E IN WITNESS WHEREOF this Certificate was duly executed this 9th day of May, 2001 by THE INTERPUBLIC GROUP OF COMPANIES, INC. by the affixing of its common seal in the presence of:-

Senior Vice President:

F Sgd.:(Illegible)

C. Kent Kroeber

Secretary:

: Sgd.: (Illegible)

G

Nicholas J. Camera

Grantee: _____

(Signature)

H (5/19/97).

I

[69] The plaintiff merely returned the stock option certificate unsigned because at that point of time he considered himself to have been constructively dismissed by the defendant.

[70] The defendant took advantage of the existence of the letter from Peter M Davis and contended that the recommendation must have been made. In his witness statement, Anthony Jerard alluded to the issue of recommendation when answering question 19. This was how the question was posed and his answer to that question:

> Q19:Are you aware if the defendant company made a recommendation for the grant of share options to the Compensation Committee?
>
> I am not aware of whether a recommendation was made. However, to the best of my knowledge from documents made available to the defendant company, the plaintiff was sent a letter informing him of the grant of share options together with the Plan Option Certificate and the terms and conditions applicable to the plan. Based on the relevant article, a recommendation must have been made in order for the plaintiff to receive the grant of share options.

[71] Indeed if there was such a recommendation, the crucial question to pose would be when exactly was the recommendation made? It must be recalled that the defendant's obligation was to make the recommendation as soon as practicable after 28 November 2000. So, when exactly was it made? It must be borne in mind that the defendant did not lead any evidence on this point. Nor did the defendant lead evidence to show as to why it was not practicable to make the recommendation until sometime before 9 May 2001. In my judgment, even if the defendant were to make the recommendation and did make the recommendation, it was never done as soon as practicable after 28 November 2000. That being the case, the defendant must be held to be in breach of the second limb of its obligation under cl 6.01 of the employment agreement.

[72] I agree with the plaintiff's submission that Draftworldwide Inc's letter of 25 July 2001 and the purported grant of options was nothing more than a hastily conceived and clumsily constructed attempt to appease the plaintiff.

[73] Three pertinent questions must be posed. Were the options granted on 9 May 2001? Or were the options granted in haste in July 2001 and back-dated? Indeed, if the options were granted on 9 May 2001, why was the plaintiff not informed of the same immediately? It must be borne in mind that by 9 May 2001, Draftworldwide Inc was fully aware that the plaintiff had been consistently complaining about the shares. Even Anthony Jerard in cross-examination confirmed that he had always passed the plaintiff's

complaints to Greg Paul (see p 45 of the notes of evidence). Another pertinent question would be this: why was there a delay of over two and a half months in informing the plaintiff of the grant of the shares? All these crucial questions could be answered by the makers of the option certificate, namely, C Kent Kroeber and Nicholas J Camera had they being called to testify for the defendant. Unfortunately, the defendant saw it fit not to call them as their witnesses and that failure should trigger the provision of s 114(g) of the Evidence Act 1950 against the defendant.

[74] I wonder why did Draftworldwide Inc wait until 25 July 2001 to issue the letter announcing the option to obtain 3,000 shares? Was it because the defendant was now aware that the plaintiff had issued a letter dated 19 July 2001, as reproduced earlier, seeking rectification of the defendant's breaches and threatening to accept the defendant's repudiation of the contract and by issuing the letter on 25 July 2001 the defendant thought that it would significantly appease the plaintiff and maintain the status quo? It must be recalled to mind that Anthony Jerard had confirmed in cross-examination that he had forwarded the plaintiff's letter dated 19 July 2001 to his head office in order to 'verify' the position regarding the options as reflected at p 44 of the notes of evidence. But, when Anthony Jerard was asked in cross-examination whether Draftworldwide Inc's letter of 25 July 2001 was sent by way of a response to his verification exercise, he cannot positively affirm it but merely said, 'I cannot confirm'.

[75] It is rather obvious that all these nagging questions could readily be answered by Peter M Davis — the maker of the letter dated 25 July 2001, bearing in mind that Anthony Jerard was not even aware of this letter (see p 44 of the notes of evidence). It seems to me that the cornerstone of the defendant's defence hinged on the letter dated 25 July 2001 emanating from Peter M Davis and that would be that the recommendation must have been made. Yet, the plaintiff was not accorded the opportunity of cross-examining Peter M Davis on this very letter.

[76] Cross-examination is the best method to elicit evidence which supports the version of the cross-examiner of the facts in issue. It is also meant to cast doubt upon the witness's evidence. A witness under cross-examination may be asked leading questions and the answers may be favourable to the cross-examiner than to the party who called him (*Parkin v Moon & Anor* (1836) 7 CAR & P 408). It is up to the presiding judge, who has the overall discretionary power, to prevent any questions which are unnecessary, improper or oppressive. The presiding judge will restrain the cross-examiner from embarking on lengthy cross-examination on irrelevant issues (*R v Kalia and Ors* [1975] Crim LR 181 (CA); and *Mechanical and General Inventions Co Ltd, and Lehwess v Austin and The Austin Motor Co Ltd* [1935] AC 346

at p 359 (HL)). The presiding judge will allow the cross-examiner to ask questions not raised during examination-in-chief but these questions may relate to any fact in issue or is considered relevant to a fact in issue. But this does not mean that the evidence which is inadmissible can become admissible by just putting it to a witness in cross-examination because the ordinary rules relating to admissibility of the evidence operate to prevent the cross-examiner from eliciting such evidence (*R v Thomas Michael Treacy* [1944] 2 All ER 229; *Rex v William Arnold Thomson* [1912] 3 KB 19; *Re P* [1989] Crim LR 897 (CA); *Beare v Garrod* (1916) 85 LJKB 717 (CA); *Sharp v Loddington Ironstone Company Limited* (1924) 132 LT 229 (CA)).

[77] All these privileges accrued to the plaintiff to cross-examine Peter M Davis, C Kent Kroeber and Nicholas J Camera were denied because the defendant did not call them as the defendant's witnesses and, consequently, the adverse inference under s 114(g) of the Evidence Act 1950 should be drawn against the defendant.

[78] Clause 6.01 of the employment agreement obliged the defendant not only in making the recommendation but also to ensure that the options when granted will be exercisable by the plaintiff in accordance with the express provisions of cl 6.01. According to cl 6.01 the options shall be exercisable 40% after the date of the first year anniversary of the grant date, 30% after the second year anniversary of the grant date, and 30% after the third year anniversary of the grant date. But according to the option certificate at p 21 of the agreed bundle of documents, the options were on these terms:

> The Option may not be exercised in any part for a period of three years from the date of granting hereof. Thereafter the Option shall be exercisable in three annual installments. The first installment shall be for 40% of the number of shares covered by the Option. Each succeeding installment shall be for 30% of the number of shares covered by the Option. The first installment may be exercised on or after the third anniversary date hereof, and each of the two additional installments may be exercised on or after each successive anniversary date.

[79] Without a doubt, the option certificate did not comply with the terms of cl 6.01 of the employment agreement notwithstanding the fact that Draftworldwide Inc was fully aware of all the terms of the said clause.

[80] To lend credence to the argument that Draftworldwide Inc knew the terms of cl 6.01 of the employment agreement, a peek into the witness statement of Anthony Jerard at question 4 and the answer thereto would be ideal:

> Q4: Please refer to pages 1 – 10 of the Agreed Bundle of Documents. What is this document?

> This is Standard Form Employment Agreement adopted from our head office in the United States which was entered into between the Plaintiff and the Defendant Company.

[81] A flurry of questions surfaced. Why did the defendant not comply with the terms of cl 6.01 of the employment agreement? Was it done deliberately? If so, why? Was it an inadvertence on the defendant's part? Was it because of undue haste that after receiving the plaintiff's letter dated 19 July 2001, Draftworldwide Inc accidentally overlooked the terms of cl 6.01 of the employment agreement? Sadly, all these questions are left unanswered for the simple reason that the defendant did not call any of the witnesses which I earlier mentioned who might have provided the answers. As it stands, we are totally left in the dark.

[82] And in interpreting cl 6.01 of the employment agreement, the effect of the imperative word 'shall' cannot be overlooked. It makes it clear as crystal that the options when granted will be on the same terms as set out in cl 6.01 of the employment agreement. Adopting a contrary approach, the defendant contended that its only obligation was to make the recommendation and that it had no power to dictate the terms of the grant of the options. I cannot accept such a contention. It is clearly untenable. To accede to the defendant's contention would mean that the plaintiff's right to the options under cl 6.01 of the employment agreement would be rendered worthless.

[83] With respect, the defendant's interpretation of cl 6.01 of the employment agreement goes against logic and common sense. What the defendant is saying is that this court should disregard the entire passage in cl 6.01 of the employment agreement pertaining to the timetable or the schedule in relation to the exercise of the options. That cannot be the right way to construe cl 6.01 of the employment agreement. Lord Bingham of Cornhill summarised the principles of interpretation in *Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251 at p 259 in this way:

> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

[84] For the reasons adumbrated above, the plaintiff succeeded in proving, on the balance of probabilities, that the defendant had breached its obligations under cl 6.01 of the employment agreement.

[85] I will now examine the other issues raised by the parties as pleaded in the pleadings.

EMPLOYEES' PROVIDENT FUND ('EPF')

[86] This was averred in the plaintiff's statement of claim and by letter dated 2 April 2001, the parties agreed that the plaintiff was entitled to participate in the EPF. Notwithstanding all these, the fact of the matter was that the plaintiff did not participate in the EPF.

[87] In his witness statement, Anthony Jerard had this to say about the EPF issue (see questions 26 and 27 and the answers thereto at bundle marked 'L'):

> Q26: Throughout the Plaintiff's employment with the Defendant Company, were any deductions made from the Plaintiff's salary for the purposes of contributions to the Employees' Provident Fund (EPF)? No. The Defendant Company did not make any deductions from the Plaintiff's salary for EPF contributions.
>
> Q27: Did the Plaintiff complain or request that deductions be made from his salary for EPF contributions throughout his tenure of employment with the Defendant Company?
>
> No. To my knowledge, the Plaintiff accepted his entire salary without any deductions and did not protest or request that deductions be made for EPF contributions. The Plaintiff also never provided us with notice that he intended to contribute to the EPF and hence no deductions were ever made.

[88] In cross-examination, the plaintiff explained that he did not, as an expatriate, register with the EPF because he was not given the opportunity to do so. According to the plaintiff he was never given any forms to sign in regard to EPF and that he expected all that to be taken care of by the defendant (see p 8 of the notes of evidence). It seems to me that the plaintiff, as an expatriate, took the view that the defendant having agreed that the plaintiff would participate in the EPF should have taken all the necessary steps to ensure that the plaintiff participated in the EPF by providing the necessary forms for registration with the EPF.

[89] It cannot be disputed that the plaintiff was never provided with the necessary EPF forms by the defendant. Surprisingly, the defendant led no evidence that it had provided the EPF forms to the plaintiff. In fact, this was not even put to the plaintiff during cross-examination. Under cross-examination, Anthony Jerard merely said that he had advised the plaintiff that the plaintiff was required to give some form of notice to the defendant requesting for EPF deductions. But when pressed further, Anthony Jerard could not recall when he had done so (see p 55 of the notes of evidence). Neither did the defendant produce any documentary evidence to

show that the plaintiff had been advised as alleged by Anthony Jerard. Finally, when cornered against the wall, so to speak, Anthony Jerard agreed that he did not ask the plaintiff to give the defendant the requisite notice of the plaintiff's intention to be a member of the EPF (see p 56 of the notes of evidence).

[90] In my judgment, on the balance of probabilities, the plaintiff has succeeded in proving that the defendant had breached the contract in regard to the term relating to the EPF contributions.

INTERNET ACCESS

[91] Given the nature of his duties and the business of the defendant, access to the internet for the plaintiff and his staff at the creative department was imperative. It was a key requirement of his contract (see bundle marked 'J' at p 14). The same would also be true for the plaintiff's witness by the name of Ng Geok Boey (PW2). In his witness statement, Ng Geok Boey emphasised the importance of internet access (see p 3 thereof):

> Q7: Why did you leave?
>
> A7: I found that the facilities provided for work were inadequate. In particular, all the staff in the Creative Department and I were denied access to the Internet.
>
> Q8: What was the importance of Internet access?
>
> A8: In our line of work, quite apart from quality of the artwork in terms of design, speed and efficiency were also important. With Internet access I would have been able to access and, if necessary, download a large variety of images, information, logos, reference pictures, corporate images, type styles and other important material to help me in designing the necessary advertising materials. I would also have been able to communicate better and faster with clients. Without the Internet, I had to perform my tasks in the 'old way' – physically going through hard copies of the limited materials available in the office such as photographs, magazines, etc, and then physically forwarding my finished products to clients. It was simply not an efficient or competitive way of doing things.

[92] All in all, the plaintiff had nine staff (see p 21 of the notes of evidence). Yet, only the plaintiff and one other staff by the name of Po Wen were given internet access (see p 20 of the notes of evidence).

[93] The defendant was in breach of one of the terms of the contract. Realising its folly, the defendant sought to justify its breach in the following ways:

(1) by emphasising that the plaintiff and Po Wen were given access to the internet, but with respect, this cannot be a defence nor did it explain why the rest of the plaintiff's staff were denied access to the internet;

(2) by stating that neither did the plaintiff nor his staff missed any deadlines nor were they reprimanded (see the witness statement of Anthony Jerard at question 37 and the answer thereto as well as pp 21 and 30 of the notes of evidence) and such statement was irrelevant and did not mitigate the failure of the defendant to provide internet access to all of the plaintiff's staff;

(3) by stating that internet access was the prerogative of the management (see p 21 of the notes of evidence) — this was not the truth because it was an agreed term of the contract and the defendant had breached it; and

(4) by cross-examining Ng Geok Boey and putting to him that by providing internet access would cost the defendant money (see p 30 of the notes of evidence) — this is irrelevant bearing in mind that the defendant had agreed to provide internet access to the plaintiff and all his staff.

[94] Again, on the balance of probabilities, the plaintiff has proved that the defendant had breached the contract in regard to the provision of access to the internet for all the plaintiff's staff.

ACCESS TO THE COMPUTER HARDWARE AND SOFTWARE IN THE CREATIVE DEPARTMENT

[95] It must be borne in mind that the defendant had agreed to give the plaintiff and his staff reasonable access to all the equipments and facilities and the defendant emphasised that it would maintain trust and confidence in the plaintiff. But sad to say, neither the plaintiff nor any of his staff had any access to the computer software. Everything was under the control of the defendant's accountant by the name of Suan Choo.

[96] It is germane to mention that the plaintiff was not cross-examined on this point and neither did the defendant lead any evidence to refute that Suan Choo was controlling the computer software. And Suan Choo was also not called by the defendant as a witness. I would readily invoke s 114(g) of the Evidence Act 1950 against the defendant.

[97] According to the plaintiff in his witness statement at p 15, Suan Choo's control of all the computer hardware and software in the creative department of the defendant gave the impression that 'the defendant had no confidence in' the plaintiff's 'managerial and administrative abilities'.

TELEPHONE BILLS

[98] Factually, it is not disputed that the defendant had agreed to pay the

plaintiff's telephone bills. There was evidence that the plaintiff's telephone lines including his handphone were disconnected on several occasions as a result of the defendant's failure to settle the bills on time (see the plaintiff's witness statement at question 46 and his answers thereto). In regard to the handphone line, the plaintiff was cross-examined and the exchange went like this (see p 17 of the notes of evidence):

> Q: Are you aware that the interruption to your handphone line was because you exceeded your credit limit and not because of non-payment?
>
> A: My handphone was cut off on more than one occasion due to late payment of the bills.

[99] However, the plaintiff was not cross-examined on the question of whether the disconnections occurred on several occasions. The defendant merely sought to deny the breach of the term of the contract by making reference to:

(i) an incident sometime in January 2001 when the plaintiff's house telephone line was disconnected; and

(ii) another incident that occurred sometime in July 2001 when the plaintiff's handphone line was disconnected.

[100] Even if this court were to accept the defendant's version of the events that occurred in January 2001 and in July 2001 with regard to the issue of the telephone bills, the defendant had already breached the term relating to payment of the telephone bills on other occasions.

AUTOMOBILE EXPENSES THAT WOULD INCLUDE PETROL, MAINTENANCE AND PARKING CHARGES

[101] It was the stand of the plaintiff that his BP card was declined on several occasions and that he was disallowed to utilise the parking area of his office on several occasions on account of the defendant's failure to make the necessary payments as agreed (see the plaintiff's witness statement at p 14 and the notes of evidence at pp 19–20).

[102] And the defendant did not cross-examine the plaintiff as to whether these breaches occurred on several occasions.

[103] In regard to the petrol expenses that were incurred, the defendant denied that there was such a breach and heavily relied on one incident when BP Malaysia Sdn Bhd apologised for disruption over the plaintiff's use of the BP card due to a 'technical error' (see p 19 of the notes of evidence and question 29 and the answer thereto of the witness statement of the plaintiff).

[104] In regard to the car park charges, Anthony Jerard did not allude to it at all during his examination-in-chief. On the other hand, the cross-examination of the plaintiff was confined to the fact that the complaint regarding the non-payment of the car park charges was not mentioned in the plaintiff's letter dated 19 July 2001 (see p 20 of the notes of evidence).

[105] In my judgment, the failure on the part of the plaintiff to mention in his letter dated 19 July 2001 in regard to the non-payment of the car park charges was entirely irrelevant. The fact of non-payment did exist at the time of the plaintiff's acceptance of the defendant's repudiation. At this juncture, the speech of Devlin J in *Universal Cargo Carriers Corporation v Citati* [1957] 2 All ER 70 at p 89 would be apt. There His Lordship said:

> It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason.

[106] On this issue, the plaintiff succeeded, on the balance of probabilities, to prove that the defendant had breached the term relating to the payment of automobile expenses.

THE CORE OF THE CONTRACT

[107] The breaches by the defendant of cl 6.01 of the employment agreement compounded by the cumulative effect of the other breaches as alluded to above — issues pertaining to EPF, internet access, access to the computer hardware and software, telephone bills and automobile expenses, went to the root of the contract. Such breaches entitled the plaintiff, at law, to accept the defendant's repudiation and treat the contract as coming to an end. On 27 July 2001, the plaintiff considered himself as constructively dismissed. The very rubric or substance of the contract had collapsed. It was beyond redemption.

[108] What the plaintiff did was perfectly legitimate. It is supported by the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, a decision of the Supreme Court with a coram of Salleh Abas LP, Wan Suleiman and Syed Agil Barakbah SCJJ. In delivering the judgment of the Supreme Court, Salleh Abas LP had this to say in regard to constructive dismissal (see p 95 of the report):

> The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.

[109] The English Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2005] 1 All ER 75 with a coram of May, Dyson and Wall LJJ dealt with the issue of constructive dismissal. Dyson LJ writing the judgment of the Court of Appeal summarised the law relating to the constructive dismissal in this way (see pp 80–83 of the report):

The Law

[14] The following basic propositions of law can be derived from the authorities. (1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; [1978] 1 All ER 713. (2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA (in liquidation)*; *Mahmud v Bank of Credit and Commerce International SA (in liquidation)*[1997] 3 All ER 1 at pp 5, 14–16; [1998] AC 20 at pp 34–35, 45–46 per Lord Nicholls of Birkenhead and Lord Steyn respectively. I shall refer to this as 'the implied term of trust and confidence'. (3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347 at p 351; [1981] ICR 666 at p 672, per Browne-Wilkinson J. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. (4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik*'s case [1997] 3 All ER 1 at p 5; [1998] AC 20 at p 35, the conduct relied on as constituting the breach must:

> impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

(5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in Harvey on *Industrial Relations and Employment Law* vol 1, para 480:

> Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but

when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.

[15] The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1985] IRLR 465; [1986] ICR 157. Neill LJ ([1985] IRLR 465 at p 468; [1986] ICR 157 at p 167) said that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said ([1985] IRLR 465 at p 469; [1986] ICR 157 at p 169):

> (c) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? See *Woods v W M Car Services Ltd*. This is the 'last straw' situation.

[16] Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim *de minimis non curat lex*) is of general application.

[17] It is the alleged failure by the ET in the present case to apply the judgment of Glidewell LJ which led the EAT to allow the appeal. It is submitted by Mr Weiniger on behalf of the council that although, as Glidewell LJ makes clear, the final straw does not need to be a breach of contract, it must at least be conduct which is 'blameworthy or unreasonable'. Anything less than a breach of contract or conduct which is blameworthy or unreasonable is not capable of being a final straw in the sense discussed by Glidewell LJ.

[18] On behalf of Mr Omilaju, Mr Edward Jnr submits that: (i) the final straw does not need to be a breach of contract (see *Lewis*' case), (ii) blameworthy or unreasonable conduct in a final straw case must by definition be, or at least contribute to, a breach of the implied term of trust and confidence, but (iii) since the breach of this implied term is, by definition, also a breach of contract, it cannot be a requirement that a final straw should amount to blameworthy or unreasonable conduct, since *Lewis*' case says that it does not need to be a breach of contract.

[19] The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in *Woods*' case [1981] IRLR 347 at p 351; [1981] ICR 666 at p 671 where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, 'squeezes out' an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

[20] I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behavior may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

[21] If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

[22] Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in [14], above).

[110] In *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] 3 CLJ 475 at pp 497–498, I had occasion to say something about constructive dismissal. This was what I said:

> In my judgment, the doctrine of constructive dismissal is here to stay. It is not a mere label coined to benefit the employee in an industrial dispute. It is a doctrine that gives life to an employee who has been dismissed without just cause or excuse. It is a doctrine that existed since time immemorial and has been adopted vigorously by the then Supreme Court in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd*. This doctrine hinges on the contract test as elucidated by Lord Denning in *Western Excavating (ECC) Ltd v Sharp*. In a broad sense constructive dismissal occurs when an employer repudiates a contract of employment. The repudiation may take the form of a breach, anticipatory breach or notice of intention. It may be express or implied and it must go to the substance of the contract.
>
> If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract. It can safely be said that one term which, if not express, may be implied in a contract of employment and it is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract. What has to be ascertained is whether in all the circumstances of the case the responsibilities and duties of the employee have been so altered by the employer as to constitute a breach of a fundamental term of the contract of employment (see *Orth v MacDonald Dettwiler & Associates Ltd* [1986] 16 CCEL 41 at pp 55, 60; 8 BCLR (2d) 1 (CA) and *Lesiuk v British Columbia Forest Products Ltd* [1986] 15 CCEL 91 at p 102; 8 BCLR (2d) 297, 33 DLR (4th) 1 (CA)). Lambert JA in *Farquhar Butler Brothers Supplies Ltd* 23 BCLR (2d) 89 defined constructive dismissal in this way (see p 92 of the report):
>
> > A constructive dismissal occurs when the employer commits either a present breach or an anticipatory breach of a fundamental term of a contract of employment, thereby giving the employee a right, but not an obligation, to treat the employment contract as being at an end …
>
> In *Nicholls v Air Products Canada Ltd* [1991] Rep Oct 1109 at p 1115, the court said:
>
> > … in order for (the doctrine of constructive dismissal) to apply, the employer must have unilaterally changed a term or condition of … employment. To amount to a constructive dismissal, the change must affect a fundamental term

A of the employment contract. Changing an employees remuneration, benefits, job content, job status, job duties, or demoting the employee, are examples of situations which could lead to a finding of constructive dismissal.

B **[111]** In my judgment, in this case, the evidence adduced showed that the defendant's breaches went to the root of the contract. The plaintiff rightly considered himself as constructively dismissed.

DAMAGES

C

[112] The plaintiff took the necessary steps to mitigate his losses when his contract was terminated. But, unfortunately, he was unable to secure any employment. When his contract was terminated he was 63 years of age and potential employers regarded him as too old. In short, he was jobless and had
D no income ever since he was terminated. Surprisingly, the plaintiff's evidence on mitigation went unchallenged. There was no cross-examination at all.

[113] The plaintiff quantified his damages at RM461,000 which
E comprised of the following items:

(1) loss of agreed salary of RM17,000 per month for the remaining 20 months' of employment amounting to RM340,000;

(2) loss of annual home leave allowance of RM15,000 per year for two
F years amounting to RM30,000;

(3) loss of annual housing rental of RM39,000 per year for the remaining 20 months' of employment amounting to RM65,000; and

(4) loss of annual club membership and fees of RM13,000 per year for two
G years amounting to RM26,000.

[114] It must be emphasised that the plaintiff was not cross-examined on this quantification.

H **[115]** On damages, the Federal Court in *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171 at p 172 had this to say:

> The measure of damage recoverable involves the consideration of s 74 of the Contracts (Malay States) Ordinance which substantially affirms the rule of
I common law laid down in *Hadley v Baxendale* (1854) 9 Exch 341 which was in two parts, namely (1) damage arising naturally, ie according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[116] Now, when you talk of damages you invariably make reference to compensation in monetary forms. It is always in reference to compensation in money.

[116] *Damnum absque injuria*: no damages can be awarded in the absence of a wrong. Lord Wright in *Hay or Bourhill v Young* [1943] AC 92 at p 106 aptly said:

> Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is damnum absque injuria. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff.

[117] In answering the question of whether a wrong has been done by the defendant to the plaintiff, the answer is in the positive. Pecuniary loss, like the present case at hand, is capable of being arithmetically calculated in money. The plaintiff has calculated it and the defendant did not challenge it in cross-examination. It is apt, at this juncture, to refer to the speech of Lord Halsbury LC in *The Owners of the Steamship 'Mediana' v The Owners, Master and Crew of the Lightship 'Comet', The 'Mediana'* [1900] AC 113 at pp 116–117, and this was what His Lordship said:

> … how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given.

[118] The idea of damages as stated by Lord Blackburn in *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 at p 39 sets out the meaning of the word 'damages'. This was what His Lordship said and it has been repeated by many judges the world over. Allow me to borrow his words:

> that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[119] The damages quantified by the plaintiff would surely put the plaintiff in the same position he was in if he had not been constructively dismissed by the defendant. To put it differently, the plaintiff is entitled to be placed, so far as money can do it, in the same position as he would have been in had the contract been performed (*Lock v Furze* (1865–1866) LR 1 CP 441 at p 453; *Sally Wertheim v Chicoutimi Pulp Company* [1911] AC 301 (PC) at p 307; *British Westinghouse Electric and Manufacturing Company, Limited v*

Underground Electric Railways Company of London, Limited [1912] AC 673 at p 689).

THE DEFENDANT'S COUNTERCLAIM

[120] It was the defendant's wrongful repudiation that led to the termination of the contract. There was no question of the plaintiff being required to give four months' notice or paying four months' salary in lieu of notice. I reiterate that the plaintiff was constructively dismissed. There was no basis, at all, to entertain the defendant's counterclaim.

CONCLUSION

[121] For the reasons adumbrated above, I allowed the plaintiff's claim for RM461,000 as damages with interest thereon at 8%pa from 3 January 2002, being the date wherein the writ of summons was dated, until the date of full payment and costs.

[122] Finally, I dismissed the defendant's counterclaim with costs.

Plaintiff's claim allowed with costs. Defendant's counterclaim dismissed with costs.

Reported by Kanesh Sundrum